

IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

No. 18

IN THE MATTER OF
ALBERT MARTIN COHEN, an attorney,

Petitioner.

DENIS M. HURLEY,

Respondent.

**BRIEF FOR THE NEW YORK CIVIL LIBERTIES
UNION AMICUS CURIAE**

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Statement of Interest

The New York Civil Liberties Union is interested in this proceeding because the issue presented raises a grave question of civil liberties: whether a member of a profession, in this case, the legal profession, may be coerced into waiving the privilege against self-incrimination under threat of the cancellation of the license to practice that profession.

It is apparent that the license to practice a profession, especially after it has continued for 38 years, as in this case is of great value: The license has value, among other things, as a means of earning one's livelihood, and

is thus of great economic importance to the holder of such a license. *Schware v. Board of Examiners*, 353 U. S. 232, 238; *Cammer v. United States*, 350 U. S. 399.

Jurisdiction Lies in This Court

It follows that a threat of disbarment from practice is a powerful weapon toward the destruction of the privilege against self-incrimination, guaranteed by Art. I, sect. 6 of the Constitution of the State of New York. The attempt in this proceeding to destroy that constitutional protection by means of coercion through disciplinary measures against the petitioner is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Although the privilege against self-incrimination is granted by the State, nevertheless, this Court has jurisdiction to inquire whether the State courts have applied the provisions of the State Constitution in a reasonable manner, consistent with due process. Therefore, a Federal question is presented.

POINT I

The petitioner was denied due process of law in violation of the Constitution.

The petitioner is a person entitled to all the rights and protections of the Federal Constitution. The fact that he is an attorney-at-law does not serve to deprive him of the rights any other person has. Had he been arrested on a charge of unlawful solicitation (a charge which the record does not make, since the only issue here is his refusal to answer questions on the grounds of self-incrimination), it could not be disputed that the petitioner would have had the right to refuse to answer questions that might incriminate him.

It was said by the State courts that because petitioner refused to answer, the inference is clear that he is unfit to be a lawyer, because candor is a mark of a lawyer.

That conclusion violates two cardinal principles of due process:

1. The inference that a person is unfit to be a lawyer because he pleads against self-incrimination has no support in reason. This Court has held that no inferences of wrong-doing can be drawn from the plea because a keystone of civil liberties in this country is that all persons are innocent until proved guilty. *Slochower v. Board of Higher Education of the City of New York*, 350 U. S. 551; *Quinn v. United States*, 349 U. S. 155.

2. Nevertheless, the State courts held that a duty exists upon an attorney to cast aside his constitutional protection and speak up; otherwise he is deemed unfit to be a lawyer. He is no longer fit to practice, it was said, because he was not candid to the Appellate Division. The argument that a lawyer must give up a constitutional right or else be penalized with disbarment is untenable. Were this argument adopted, like application could be made as to all licensees, be they physicians, merchants, peddlers, or motorists.

There is no special injunction in law that requires a lawyer to be candid. It was said by the courts below that canons of ethics require it. In other words, the pronouncements of other members in the profession what a lawyer should do, even to the sacrifice of constitutional rights was deemed more controlling than the Constitution. Due process requires more. It requires that the deprivation of liberty and property be by the law of the land, not by principles announced by other lawyers.

The result reached in the State courts rested on the canon of ethics. The result thus is not supported by the law of the land and by itself is a denial of due process.

The courts below ruled that a mere refusal to speak was a sufficient violation of the canons of ethics and therefore was paramount to the claim of the privilege to remain silent. Distinction must be made, however, between refusal to speak and refusal based upon a claim of self-incrimination made in good faith. The difference is a significant one. The coercion to yield a constitutional privilege under threat of discipline, is the crucial point of this case. A lawyer might be required to speak on matters that may not give rise to the constitutional privilege. But when the privilege is invoked, he should not be compelled to waive it in fear of consequences such as disbarment.

Nor can the state impose a *condition* for the grant or exercise of a license that would deprive a person of a constitutional right.

In *Frost v. Railroad Commission*, 271 U. S. 583, the Supreme Court said:

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it, upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is unconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

It follows from what has been said here that this petitioner was faced with a serious dilemma, either to maintain silence and be disbarred, or else speak and possibly incriminate himself. The choices open were disbarment or incrimination. The protection afforded by the Constitu-

tution was intended to save a person from being placed in this dilemma. It is the dilemma of the screw and the rack. Which form of torture is preferable? The Constitution says that neither torture is worthy the dignity of man.

When contemplating this problem, one cannot omit the historical antecedents of the privilege. In essence, the tortures, including the screw and the rack, that were used in the past to extract confessions from an unwilling witness gave rise to the present constitutional provision. History and experience have given their verdict that the dignity of man can best be preserved by discouraging illicit means, such as involuntary self-incriminating testimony.

Under similar circumstances, this Court in a case involving a *public employee*, held that it was a denial of due process under the Federal Constitution to extort a waiver of the constitutional privilege by depriving the employee of the means of earning a livelihood. *Slochower v. Board of Higher Education of the City of New York*, 350 U. S. 551. See also, *United States v. Lovett*, 328 U. S. 303, 316.

POINT II

The Nelson-Globe, Beilan and Lerner cases are distinguishable.

The cases of *Nelson and Globe v. County of Los Angeles*, 362 U. S. 1; *Beilan v. Board of Education*, 357 U. S. 399 and *Lerner v. Casey*, 357 U. S. 468, affg. 2 N. Y. 2d 355, were urged below as dispositive of the Federal issues raised here.

In those cases, county *employees* of Los Angeles, a teacher *employed* by Philadelphia and a subway conductor *employed* by the City of New York, respectively were discharged because Globe refused to testify before a Con-

gressional Committee inquiring into subversion, Beilan refused to answer questions referring to membership in the Communist Party, and Lerner because he pleaded the privilege against self-incrimination when asked similar questions. This Court upheld their dismissals as employees on the ground that their pleas in each case indicated unfitness for their employment:

But there, the emphasis was on their employment. In *Nelson-Globe*, the latest case, the dismissal was bottomed on "insubordination" by an *employee*. It is the relationship of employer and employee that enabled the control to apply. Here, there is no question that the petitioner is not an employee of the Appellate Division. Had the petitioner been employed as a librarian by that court, and had he been interrogated by it to account for missing books, and had refused to answer on the ground of self-incrimination, his case would have a kinship to the decided cases, although those cases are further qualified as security risk cases of public employees. The relationship of master and servant is based on contract, and one of its implied conditions is that the employee must account for the matters entrusted to him. Otherwise the relationship could not operate effectively.

The appellant, however, is not an employee of that Court. He is an independent private practitioner, who derives no emolument from the State or any contribution toward payment of the overhead costs of his occupation *Cammer v. United States*, 350 U. S. 399, 405.

No doubt, duress was implied in subjecting the employee in the above cases to the alternative of losing his position as the price for silence. But the Court in balancing competing interests, required the employee to yield his constitutional right to what was deemed of greater significance, the security risk of the employee in his employment. Moreover, to implement the power of interrogation, the statutes in question specifically provided for the loss of employ-

ment as a consequence of refusal to answer questions, and it should be emphasized, *were limited in scope to the problem of security risk.* In the context of the country's security only has this Court decided it weightier for the employee to surrender his constitutional privilege.

There Is No Demonstrated Causal Relationship Between Candor Upon Inquisition and Suitability to Be a Lawyer

Another feature that distinguishes those cases is the legal conclusion in them that the employees risk was rationally relevant to his suitability as an employee. In this case the constitutional issue depends upon the conclusion whether the refusal to speak renders a lawyer unsuitable for the practice of his profession. Candor by the lawyer is what the Appellate Division emphasized in this case as the essential test of suitability to practice the profession. Due process requires that a rational connection exist between the silence and unfitness for professional occupation. *Wienan v. Updegraff*, 344 U. S. 183, 191. This has not been met here. The appellant has practiced his profession for 38 years; it can be presumed that his competence as a lawyer had been dependent on factors other than candor. Candor upon interrogation has no more special meaning in the case of a lawyer than it would for any other licensee, say, a motorist. Candor helps the interrogator prove his case. In this respect candor has value. It comforts the inquisitor and spares him the necessity of proving his case by his own efforts. In the practice of law itself, it is of course desirable and necessary that a lawyer be candid with his clients and those with whom he deals. So is it a virtue for a plumber, radio mechanic or butcher. But a visit by interrogators is not the practice of his occupation. In that capacity he is acting as a private person with all constitutional privileges.

Had a policeman visited the petitioner, there would have been no question but of his right to remain silent. Why is he less fit to be a lawyer because he is questioned by another public officer? There is no rational distinction. In both cases his answers might incriminate him, and in both cases he is less than candid. It therefore follows that lack of candor is no test of suitability, whether it be before a peace officer, a grand jury or a court. And therefore, the constitutional privilege attaches.

No State Law Covers the Consequences of Invocation of the Privilege by a Lawyer

Stress should be placed on the complete absence of a law covering the consequences of exercising the privilege. In all the cases decided by this Court there are to be found provisions which put the employee on notice that he would be discharged for using the privilege, and, therefore, he was forewarned of the penalties. In that respect there was some adherence to the requirements of due process. *Winters v. New York*, 333 U. S. 507. Here there is none. The same Constitution which grants the privilege against self-incrimination, also provides for the penalty that is to be visited upon *public officers* who invoke the privilege before grand juries. Art. I, Section 6, reads:

"No person shall . . . be compelled in any criminal case to be a witness against himself, providing, that any *public officer* who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law."

The State Constitution is specific as to a "public officer." The inclusion in clear text of this group indicates an intent to exclude the others. The section applies to public employees and to no others. Since it has been amply demonstrated that a lawyer with a private practice is not a public officer, it is clear that the law does not apply to him.

Were it intended that a lawyer and other licensees who operate independently should fall within its scope, it would clearly have so provided. The failure to do so, indicates his exclusion.

The language of this constitutional provision emphasizes as few arguments can do, that when disqualification was sought to operate against those who invoked the privilege, it was effectuated only by a constitutional provision. Hence, by all the more force of reason, the absence of a constitutional provision against persons *not* in the public employ, leads to the conclusion that a court cannot spell out disqualification when the privilege is invoked.

It follows that the courts below in construing the constitutional privilege failed to support their conclusion by any rule of law, other than the broad *ad hoc* determination that the conduct prescribed was within the powers of a court.

Respectfully submitted,

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Union